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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 152.

CITY OF COVINGTON, PLAINTIFF IN ERROR,

vs.

COMMONWEALTH OF KENTUCKY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

FILED AUGUST 20, 1897.

(16,651.)

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(16,651.)

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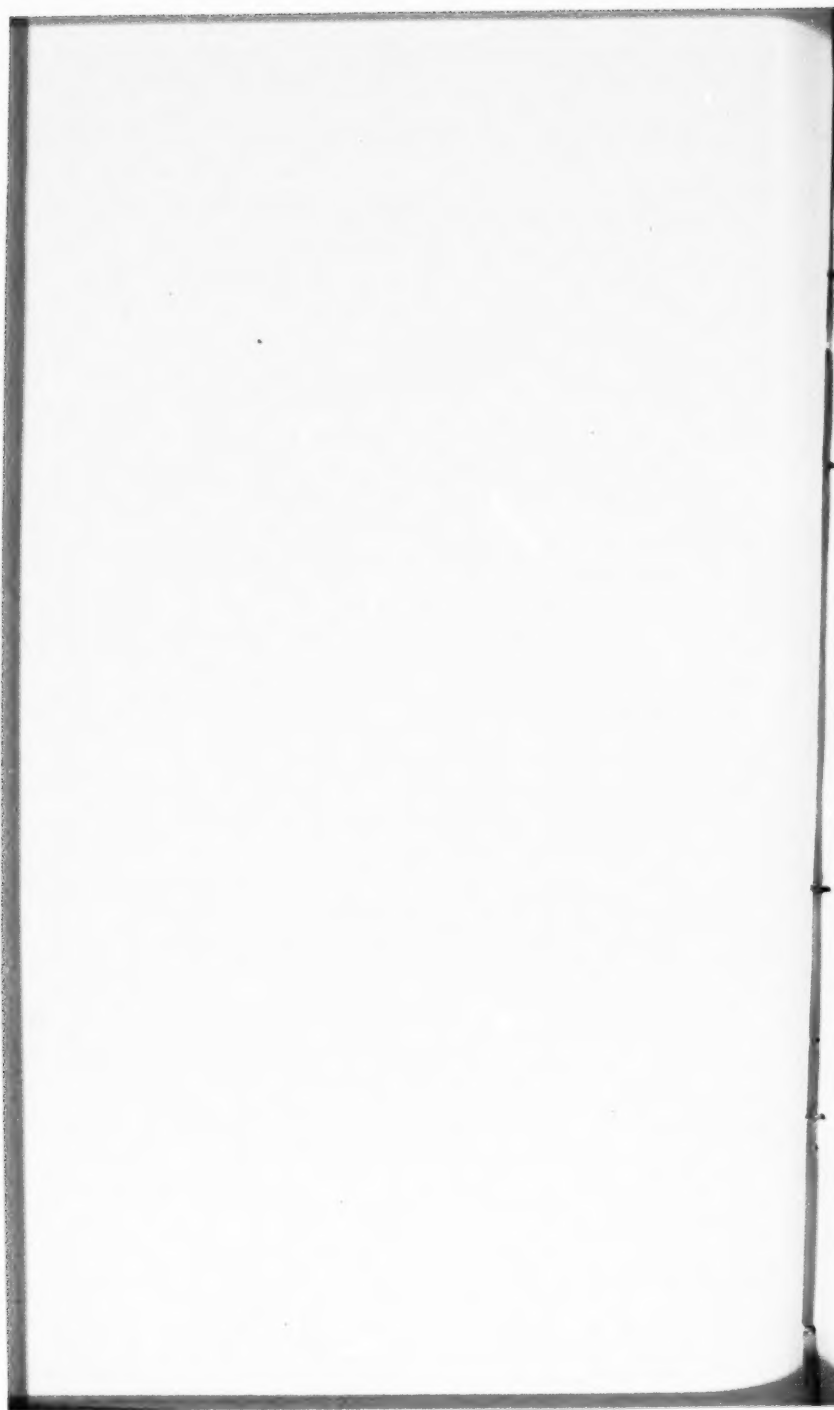
vs.

COMMONWEALTH OF KENTUCKY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

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1 COMMONWEALTH OF KENTUCKY :

Pleas before the honorable the Kentucky court of appeals, at the capitol, in the city of Frankfort, on the 20th day of March, 1897, Chief Justice Joseph H. Lewis, Judges James H. Hazelrigg, Thomas H. Paynter, B. L. D. Guffy, George Du Relle, James D. White, and A. R. Burnam sitting.

CITY OF COVINGTON, Appellant,
vs.
 COMMONWEALTH OF KENTUCKY, Appellee. }

Be it remembered that heretofore, to wit, on the 6th day of February, A. D. 1897, the appellant, by its counsel, filed in the office of the clerk of the court of appeals a transcript of a record in words and figures following, to wit :

STATE OF KENTUCKY :

Campbell Circuit Court.

Pleas.

2 Pleas before the Honorable C. J. Helm, judge of the Campbell circuit court, at the court-house, in Newport, on the 15th day of January, 1897.

Style of Suit.

THE COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
 THE TRUSTEES OF THE COVINGTON WATER WORKS, Defendants. }

Preamble.

Be it remembered that heretofore, to wit, on the 30th day of March, 1896, the plaintiff, The Commonwealth of Kentucky, by its attorney, filed its petition in the clerk's office of the Campbell circuit court against the defendant, The Trustees of the Covington Water Works, in words and figures as follows, to wit :

Petition.

Campbell Circuit Court.

THE COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
 THE TRUSTEES OF THE COVINGTON WATER WORKS, Defendant }

Petition in
 Equity.

The plaintiff, The Commonwealth of Kentucky, says that the general laws of the State require all property which is not exempted

by the general laws of the State to be assessed as of the 15th day of September at its fair cash value, estimated at the price it would bring at a fair voluntary sale, by the assessor of the county, for taxation for State and county purposes.

Plaintiff says that the defendant, The Trustee- of the Covington Water Works, was on the 15th day of September, 1894, the owner and possessor of a piece of real property described as follows, to wit, 49½ acres of land in the Highlands, and personalty.

Plaintiff says that said property is not exempted from taxation, but is directed by law to be taxed, and that the assessor of Campbell county, Kentucky, assessed said property at 332,750 dollars for State and county taxation for the year 1895, which assessment is its fair cash value estimated at the price it would bring at a fair voluntary sale, and that said county assessor made a return of the said assessment to the clerk of the Campbell county court before the 2nd day of January, 1895.

That said clerk of the Campbell county court on the first Monday of January, 1895, delivered the assessment book of the said assessor, containing the assessment of said property, to the board of supervisors of Campbell county.

That said board of supervisors examined said assessment of said property and approved and returned same to the said clerk of the county court, together with their certificate to the said assessor's book containing said assessment.

4 That said clerk of the county court tested the accuracy of the estensions and additions in said assessor's book, as made by the board of supervisors, and made a correct copy of said assessment for the use of the sheriff of Campbell county, in a book kept for that purpose, and delivered to the said sheriff of Campbell county the said book containing said copy of said assessment before the second day of March, 1895.

Plaintiff says that by virtue of the general laws of the State an annual tax of 42½ cents upon each one hundred of value as assessed for taxation, as aforesaid, is collected from each owner for State purposes, and that by virtue of the general laws of the State a tax of 12 cents was levied by the court-house commissioners of said county, for the year 1894, upon each one hundred dollars of value as assessed for taxation as aforesaid, to be collected from each owner for county purposes, and that said sheriff of Campbell county is the collector of the said revenue for the county and State in said county.

Plaintiff says that said taxes upon said property became due upon the first day of March, 1895; that it became delinquent upon the first day of July, 1895; that there was no personalty that the said sheriff could distrain for taxes due, and that upon the 17th day of December, 1895, said taxes being still due and wholly unpaid, the said sheriff did offer said property for sale at the court-house door after

5 having advertised same by posting, for fifteen days before the sale, a written notice at the court-house door and by publication once a week for four weeks prior to the sale in the Kentucky Journal, the said journal being a paper of general circulation in said county, and by sending to defendant a postal card addressed

to their place of residence, notifying them of the time and place of the sale. The said sheriff offered said property for sale as aforesaid, and, no one making any offer or bidding for same, the said sheriff purchased same for the Commonwealth of Kentucky for the sum of \$2,187.24, the said amount being the sum total of the amount of taxes due, cost of advertising, six per cent. commission, and six per cent. penalty, to wit:

	Tax.	6 % penalty.	6 % commission.	Advertising.	Total.
State	1,414.19	84.85	89.94	2.00	1,590.98
County	531.30	31.88	33.08	596.26

Said penalty, commission, and cost of advertising are added by virtue of the general laws of the State.

Plaintiff says that said sheriff made return of said sale to the clerk of the Campbell county court, and that the attorney for said Campbell county, within fifty days after said sale, notified defendant by sending them a written notice, addressed to their place of residence, that said property had been purchased by the State, and that thirty days have elapsed since said attorney sent said notice and said property has not been redeemed.

Plaintiff says that said property is indivisible, and that defendant is in possession and unlawfully withholding the possession from plaintiff.

6 Wherefore plaintiff prays judgment for the possession of said property and all proper relief.

RAMSEY WASHINGTON,
County Attorney.

And thereafter, on the 7th day of May, 1896, amended petition was lodged in the following words and figures as follows, to wit:

Amended Petition.

Campbell Circuit Court.

THE COMMONWEALTH OF KENTUCKY, Plaintiff,	} Amended Petition.
<i>vs.</i>	
THE TRUSTEES OF THE COVINGTON WATER Works, Defendant.	

By consent of the parties to the above-styled case The City of Covington is made party defendant instead of The Trustees of the Covington Water Works.

RAMSEY WASHINGTON,
Plaintiff's Attorney.

And thereafter, on the 28th day of September, 1896, demurrer to the petition was lodged in the following words and figures, to wit:

7

Demurrer.

Campbell Circuit Court.

THE COMMONWEALTH OF KENTUCKY, Plaintiff,	}	Demurrer to Petition.
<i>vs.</i>		
THE TRUSTEES OF THE COVINGTON WATER WORKS, Defendants.		

Now comes the defendant, The City of Covington, and demurs to the petition herein:

First. Because same does not state facts sufficient to constitute a cause of action.

Second. Because same does not state facts sufficient to support a cause of action.

Order.

And at a circuit court on the 5th day of October, 1896, the following order was made in the following words and figures as follows, to wit:

Def't's Demur. to Pl'ff's Pet'n Noted and Set for Hearing.

Defendant's demurrer to plaintiff's petition is noted of record, and the same is set for hearing on October 17th, 1896.

Order.

And at a circuit court on the 17th day of October, 1896, the following order was made in the following words and figures as follows, to wit:

Def't's Dem'r to Pl'ff's Pet'n Over'l'd & Def't Excepts.

Defendant's demurrer to plaintiff's petition is overruled and defendant excepts.

8 And thereafter, on the 2nd day of December, 1896, the following answer was filed in the following words and figures as follows, to wit:

Answer.

Campbell Circuit Court.

THE COMMONWEALTH OF KENTUCKY, Plaintiff,	}	Answer.
<i>vs.</i>		
THE CITY OF COVINGTON, Defendant.		

1. The defendant, The City of Covington, says that it is now and has been since March 19, 1894, a city of the second class in the Commonwealth of Kentucky by virtue of "An act for the govern-

ment of cities of the second class in the Commonwealth of Kentucky," approved on said above-mentioned date, and that previous to said date it was a municipal corporation incorporated under an act of the General Assembly entitled "An act to incorporate the city of Covington," approved February 24, 1854, and, for answer herein, admits that on the 15th day of September, 1894, it was the owner of and in possession of the real and personal property described in the petition, and denies that such property is not exempt from taxation, and denies that it is directed by law to be taxed. It denies that the taxes mentioned in the petition became due upon the first day of March, 1895, and denies that they became delinquent on the first day of July, 1895, and denies that said property is indivisible, and denies that it is unlawfully withholding the possession from plaintiff.

- 9 2. For further answer it says that by virtue of an act of the General Assembly of the Commonwealth of Kentucky approved May 1, 1896, "An act to amend the charter of the city of Covington," it was provided, for and on behalf of the city of Covington, the council thereof, in and by the board of trustees hereinafter provided, was authorized and empowered, at a cost to the city not to exceed six hundred thousand (\$600,000.00) dollars and the interest thereon, to build a water reservoir or reservoirs in or out of the corporate limits of the city of Covington and either in Kenton county or in any county adjacent thereto, the approaches thereto, and the connections by pipes or mains with the present water-pipe system of Covington, and to acquire by purchase or condemnation in fee-simple in or out of the corporate limits of Covington and either in Kenton county or in any county adjacent thereto such land or lands as may be necessary for said reservoirs, the approaches thereto, and the connections thereof with the present water-pipe system of Covington; to build a pumping-house and to provide the same with all necessary machinery and appliances for pumping water into said reservoir or reservoirs, the said pumping-house to be located near or adjacent to the Ohio river and the water supplied to the said reservoirs to be taken therefrom, and to acquire, by purchase or condemnation in fee-simple, such land as may be necessary for the site of said pumping-house and the connection thereof by pipes or mains with said reservoir or reservoirs and for all necessary appendages, appurtenances, and roadways, to the end that the city of Covington and the citizens thereof may be provided with
- 10 an ample supply of pure water for all purposes, and to provide the sum of money which the said council by said board of trustees was authorized to expend for the purposes mentioned. Said board of trustees was authorized and empowered to issue and sell in the name and under the corporate seal of the city of Covington on the bonds of said city to an amount not exceeding the sum of six hundred thousand (\$600,000.00) dollars, payable in not more than forty (40) years from and after the date of said bonds, bearing interest at a rate to be fixed by council, not exceeding five (5 %) per cent. per annum. Said bonds were to be denominated "Covington

City bonds," and that they should remain exempt from city taxation.

It further provided how said bonds should be signed and issued. It was provided, however, that said bonds should not be issued and sold without the question of issuing the same and whether the said reservoir or reservoirs should be located above or below the city of Covington should have been first submitted to the qualified voters of Covington at an election to be held for that purpose; and it further provided that if the majority of the votes cast at said election was in favor of issuing said bonds and of the proposed location of said reservoir or reservoirs, then said bonds should be printed and engraved, but not signed, and deposited for safe keeping in one of the banks of the city of Covington, and that they should be signed and issued, as provided, as they should be needed for the purposes in the acts mentioned.

11 It further provided for the appointment of five (5) persons to constitute a board of trustees under the name and style of "the trustees of the Covington reservoir," for and on behalf of the city and of the council thereof, with full power and authority to make and execute all contracts and agreements pertaining to the purchase and condemnation of land for the purposes provided, the selection of the site or sites of said reservoir or reservoirs and pumping-house, the construction of same, the construction or laying of all mains leading to and from same, the equipment of the pumping-house with all proper machinery, and to such other things as were in the act committed to their care, and they and their successors should continue in office until said reservoir or reservoirs, approaches thereto, connections thereof with the pumping-house and with the water-pipe system of Covington, the said pumping-house and machinery therein, were fully completed and in actual operation and for not longer than two (2) months thereafter.

It was further provided that within two (2) months after the completion of said reservoir or reservoirs, pumping-house, connection pipes, and mains and approaches and equipment of the pumping-house with all necessary machinery, the said trustees should make and deliver to the city council a final and complete report in detail of their official acts, and of all receipts and disbursements,

12 and thereupon their powers and duties and term of office shall cease and determine, and the said reservoir or reservoirs, pumping-house, machinery, pipes, mains, and property of every description in the possession of said trustees in connection with or held by said trustees for the purposes of said trust shall be turned over and delivered to the said city of Covington, and thereafter the said reservoir or reservoirs, pumping-house, machinery, pipes, mains, and appurtenances of every description shall be controlled and managed by the commissioner of water works of the city of Covington, and in like manner in all respects by an act entitled "An act to amend the charter of the city of Covington," approved January 31, 1879.

It was further provided in section 31 of said act as follows:

"Said reservoir or reservoirs, pumping-house, machinery, pipes,

mains, and appurtenances, with the land upon which they are situated, shall be and remain forever exempt from State, county, and city taxes."

It was further provided by an act entitled "An act to amend the charter of the city of Covington," approved February 15, 1888, that the trustees were authorized to issue and sell and additional sum of four hundred thousand (\$400,000) dollars' worth of bonds.

It further says that the defendant, in consequence of and relying upon the faith and assurance of the provisions of said act, did
 13 build water reservoirs out of the corporate limits of the city of Covington in a county adjacent to Kenton county, to wit, Campbell county, Kentucky, and did construct the approaches thereto and the connections thereof by pipes and mains with the then present water system of Covington, and did acquire, by purchase and condemnation in fee-simple in Campbell county, a county adjacent to Kenton county, the lands necessary for said reservoirs and approaches thereto and connections thereof being the land mentioned in plaintiff's petition; that it did build a pumping-house and provide same with necessary machinery and appliances for pumping water into said reservoir, and did acquire land, by purchase and condemnation in fee-simple, necessary for the site of said pumping-house and connection thereof by pipes and mains with said reservoirs, and for all necessary appendages, appurtenances, and roadways, to the end that the city of Covington and the citizens thereof might be provided with an ample supply of pure water for all purposes.

That the question of whether or not the bonds or reservoirs should be located above or below the city of Covington was submitted to the qualified voters of Covington, at an election held for that purpose, and that at said election a majority of the votes cast were in favor of issuing bonds and the location of said reservoirs above the city of Covington, and that thereafter said sum of six hundred thousand (\$600,000.00) — worth of bonds were issued and disposed of in the manner required by said act; that the five (5)

persons were duly appointed and did act as such until said
 14 works were completed, and that within two (2) months after the completion of said reservoirs, pumping-house, connection pipes and main and approaches, and the equipment of the pumping-house with all necessary machinery, said trustees did make and deliver to the city council of Covington the final and complete report in detail of all their official acts, etc., and that their official powers ceased and the said reservoirs, pumping-house, machinery, pipes, mains, and property of every kind were turned over and delivered to the city of Covington and the same were managed until March 19, 1891, by the commissioners of water works, according to "An act to amend the charter of the city of Covington," approved March 31, 1879, and that since March 19, 1891, said water works, being owned by the city of Covington, are, by virtue of section 38 of article 5 of "An act for the government of cities of the second class in the Commonwealth of Kentucky," approved March 19, 1894, controlled and managed by a board styled "the commissioners of

water works," subject to such regulations and limitations as the general council of Covington may provide; and it is further provided, in section 30 of article 4 of said last-mentioned act, that "the net revenue derived in any city of the second class from its water works shall be applied exclusively to the reimpovement or reconstruction of the streets and other public ways of the city."

It further says that the said trustees did issue and sell four hundred thousand (\$400,000.00) dollars' worth of bonds of the
15 city of Covington, as provided by the act of February 15, 1888, and the proceeds of same were used in the construction of said water works and appurtenances thereto.

It says that said bonds herein mentioned and the interest thereon are paid from the general revenues of the city of Covington derived from the taxation of the property of the citizens of Covington; that there have been redeemed of said bonds the sum of ninety thousand (\$90,000.00) dollars' worth, and that the remainder of same, with interest at four (4) per cent., are unpaid.

It says that the revenue derived from said water works in excess of the necessary running expenses of same is paid into the treasury of the city of Covington. It says that it has within its corporate limits a Federal building, a court-house and jail, market-houses, school buildings, and other public property.

It says that its said water works is used in furnishing water for the city's fire-plugs and for the fire-hydrants of the city, and for all public buildings in the city free, and it furnishes water to its citizens; that its citizens pay it for the use of the water therefrom.

It further says that its property, as described in the petition, is exempt from taxation by virtue of section 7 170 of the present constitution of the State of Kentucky, which is as follows:

"There shall be exempt from taxation public property used for public purposes," etc.

16 It further says that it is exempt from taxation by virtue of section 4026 of the Kentucky statutes, which provides: "Public property used for public purposes shall be exempt from taxation," etc. It therefore pleads and relies upon said section 170 of the constitution of the State of Kentucky and section 4026 of the Kentucky statutes for the purposes of this exemption.

And it says that the action of the county assessor of Campbell county and of the board of supervisors of Campbell county and of the sheriff of Campbell county, as alleged in the petition, in valuing and attempting to value and assess its said property by virtue of "An act relating to the revenue and taxation," which became a law November 11, 1892, was and is without authority of law and void.

3. It says that property herein mentioned is the property of the defendant, purchased and constructed and held and used by defendant, as particularly set out in the second paragraph of this answer, and that same was purchased and constructed by it, relying upon the provisions of the act of May 1, 1896, and especially of section 31 of said act, which is as follows:

"That said reservoir or reservoirs, pumping-house, machinery,

pipes, mains, and appurtenances, with the land upon which they are situated, shall be and remain forever exempt from State, county and city taxes," and it says that said property was at the time herein mentioned and is now exempt from taxation by virtue of said act, and it now pleads and relies upon said act and the exemption therein contained.

4. It says, for further answer, that it constructed its said water works pursuant to the provisions of said act, being "An act to amend the charter of the city of Covington," approved May 1, 1886, and soon after the passage of said act, and that said water works were constructed by defendant relying upon the faith of said act and by defendant accepting the provisions of said act, and particularly upon section 31 of said act, which is as follows:

"The said reservoir or reservoirs, pumping-house, machinery, pipes, mains and appurtenances, with the land upon which they are situated, shall be and remain forever exempt from State, county and city taxes," and it says that same has never been repealed or amended; and it avers that the action of the county assessor of Campbell county and of the board of supervisors of Campbell county and of the sheriff of Campbell county, as alleged in the petition, in valuing and attempting to value and assess its said property by virtue of "An act relating to the revenue and taxation," which became a law November 11, 1892, was and is without authority of law and void, and that said assessment and attempt to collect said taxes is an attempt to impair the obligation of its contract with the State of Kentucky, hereinbefore set out, and is a violation of section 10 of article 1 of the Constitution of the United States and on section 20, article 12, of the constitution of the State of Kentucky in force at the time said contract was entered into, and also in violation of section 19 of the present constitution of Kentucky, and is void.

Wherefore the defendant, The City of Covington, having fully answered, prays to be dismissed and for a judgment for its costs herein.

W. McD. SHAW,
City Solicitor.

And thereafter, on the 3rd day of December, 1896, general demurrer to answer of defendant was filed in the following words and figures as follows, to wit:

General Demurrer to Answer.

Campbell Circuit Court.

THE COMMONWEALTH OF KENTUCKY, Plaintiff,	} General Demurrer.
vs.	
THE CITY OF COVINGTON, Defendant.	

The plaintiff says that the answer of the defendant does not state facts sufficient to constitute a defence.

RAMSEY WASHINGTON,
Attorney for Plaintiff.

19

Order.

And at a circuit court on the 7th day of December, 1896, the following order was made in the following words and figures as follows, to wit:

Pl'ff's Dem'r to Def't's Answer Noted and Sub't'd on Dem'r & Set for Hearing.

Plaintiff's demurrer to defendant's answer is noted of record, and this cause is submitted on said demurrer, and the same is set for hearing December 19th, 1896.

And at a circuit court on the 2nd day of January, 1897, the following order was filed in the following words and figures as follows, to wit:

Written Order.

The case of Commonwealth vs. McKibben, 90 Ky., 384, is decisive of this case. The city of Newport sought exemption from taxation under a like exemption, and the court held the act unconstitutional. The demurrer is sustained and defendant has leave to amend. Defendant's counsel waived all other questions and his brief, and the court has consequently given no attention to the regularity of the pleadings.

20

Order.

And at a circuit court on the 11th day of January, 1897, the following order was made in the following words and figures as follows, to wit:

Pl'ff Filed Letter & Moved to Sub't for Judg't & Sub't'd.

Came plaintiff and filed letter and moved to submit this cause for judgment, and the same is submitted.

Order.

And at a circuit court on the 15th day of January, 1897, the following order was made in the following words and figures as follows, to wit:

Judg't. Appeal Prayed & Granted.

Counsel inform the court that the only question they want decided by this court is whether the water works of the defendant is liable to State tax. This was decided on demurrer, and the court is now asked to enter a personal judgment from which an appeal may be taken, defendant waiving all other questions. Therefore it is now adjudged that plaintiff is entitled to the possession of forty-nine and $\frac{1}{2}$ acres of land in the Highland district of Campbell county,

Kentucky, in which is situate the water works of defendant, and a writ of possession is awarded the plaintiff, and defendant excepts and prays an appeal; which is granted.

21 STATE OF KENTUCKY, }
Campbell County. }

I, A. L. Reuscher, clerk of the Campbell circuit court for the county aforesaid, do hereby certify that the foregoing 21 pages of typewritten matter and this page contain a full, true, and complete transcript of the record and proceedings in the within styled action as the same appears of record and on file in my office.

Witness me hand as clerk this the 4 day of February, 1897.

A. L. REUSCHER, *Clerk.*
LOUIS REUSCHER, D. C.

Upon which transcript was endorsed the following statement:

Judgment appealed from was rendered January 15, 1897 (page 20 of Transcript). No summons:

Afterwards, at a court of appeals begun and held for the Commonwealth of Kentucky, at the capitol, in the city of Frankfort, on the 20th day of February, A. D. 1897, the following order was entered:

22 Campbell.

CITY OF COVINGTON }
v. }
COMMONWEALTH. }

The parties, by counsel, filed a transcript and agreement, and on their motion and the court being advised, it is ordered that this cause be advanced and submitted.

(The transcript referred to in foregoing order is copied in this Record from page 1 to page 21.)

Afterwards, at a court of appeals held, as aforesaid, on the 20 day of March, A. D. 1897, the following judgment was entered:

CITY OF COVINGTON, Appellant, }
vs. } Appeal from Campbell Circuit
COMMONWEALTH OF KY., Appellee. } Court.

The court being sufficiently advised, it seems to them there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed, which is ordered to be certified to said court.

It is further considered that the appellee recover of the appellant its costs herein expended.

On the same date the following opinion was delivered:

23 The Commonwealth of Kentucky brought this action to recover possession of a tract of land held and claimed by the city of Covington, upon which had been erected water works. The facts upon which the right of recovery is based are, as stated

in the petition, that the city of Covington having failed to pay the State and county taxes due on said property for 1895 at the assessed value, it was in December, 1895, duly and legally offered for sale by the sheriff, who, no other person bidding, purchased it for the Commonwealth at the price of \$2,189, the sum of taxes unpaid. It is stated in the answer as defense that for reasons set forth said property was exempt from all taxation, and consequently the assessment and sale under which the Commonwealth now claims title and right of possession were illegal and invalid. To that answer a demurrer was sustained and judgment rendered in favor of the Commonwealth for a writ of possession; but, as recited in the judgment, counsel agreed the only question they wished decided was whether the property in question is liable to State taxes. The grounds upon which are based the claim of the city of Covington to exemption of the property from taxation are as follows:

1. That a provision is contained in "An act to amend the charter of the city of Covington," approved May 1, 1886, in these words: "Said reservoir or reservoirs, pumping-house, machinery, pipes, mains, and appurtenances, with the land upon which they are situated, shall be and remain forever exempt from State, county and city taxes." In *City of Louisville v. Com.*, 1 Duv., 295, where the question arose as to exemption from taxation of various articles of property owned by that city, a distinction was expressly recognized

24 between property owned and used for public purposes of a local government or used in carrying on a municipal government and property used not for that purpose, but only for the convenience or profit of its citizens, individually or collectively; and *Com. v. Makibben*, 90 Ky., 384, 14 S. W., 372, where the question was whether the water-works property of the city of Newport was, in pursuance of a special act to that effect, exempt from taxation, it was held not to be so, because not necessary or used to carry on the municipal government as a political power, but held and used merely for the convenience and profit of its citizens. Immediately following that case, in the same volume of Reports, page 515 (14 S. W., 502), is the case of *Clark v. Water Co.*, where the same question arose, and for the same reason it was held that an act exempting from taxation the property of the Louisville Water Company was in violation of the constitution, and, moreover, that the fact that the water supplied by the water company might incidentally protect public buildings of the State and city did not have effect to validate the statute.

2. It is argued that as upon the faith and in pursuance of the special statute of May 1, 1886, the city of Covington, by taxation of the property of its citizens, purchased the land and erected thereon the water works in question at great expense, it has acquired a contract right to the exemption now claimed; but it seems

25 to us, if the General Assembly was without constitutional authority to make the contract, assuming one was made, it is not, nor could be, valid or enforceable. Besides, by a general statute enacted February 14, 1856, and continued in force to the present time, the special act under which the exemption is now

claimed and all others like it were rendered subject to repeal at the will of the General Assembly.

3. And then we come to consider the third ground upon which the exemption is claimed, and that involves the inquiry whether section 170 of the present constitution and the statute passed in pursuance of it operated to repeal or continue in force that part of the special act of May 1, 1886, which exempts said water-works property from taxation. The subject of section 170 is "revenue and taxation," and so much of it as applies to this case is in these words: "There shall be exempt from taxation public property used for public purposes." It was followed by necessary statutory enactments, which, however, could neither curtail nor enlarge exemption from taxation as prescribed by the constitution; and accordingly, in section 4026, St. Ky., adopted for the purpose of carrying out the provisions of section 170, is the identical language we have quoted. As it was manifestly intended by both the constitution and statute to make subject to taxation all property not thereby in express terms exempted, it results that, unless the water-works property of the city of Covington be, in the language or meaning of section 170,

26 "public property used for public purposes," it must be held, like similar property in other cities, subject to taxation, and the special act of May 1, 1886, stands repealed. Assuming, as a reasonable and beneficial rule of construction requires us to do, that the phrase "for public purposes" was intended to be construed and understood according to previous judicial interpretation and usage, there can be no doubt of the proper meaning and application of it, for in the cases cited and others where the question of subjecting particular property of cities to taxation arose the words "for public purposes" had been held by this court to mean in that connection the same as the words "for governmental purposes," and so property used by a city for public or governmental purposes was held to be exempt, while that adapted and used for profit or convenience of the citizens, individually or collectively, was held to be subject to taxation; and, recognizing and applying that distinction, water-works property of a city has been invariably treated by this court as belonging to the latter class, and consequently subject to State and county taxation. In our opinion, the property in question is under the constitution subject to taxation, and the statute enacted in pursuance of it operated to repeal the special act of May 1, 1886.

Judgment affirmed.

27 Afterwards, on the 10th day of July, 1897, the following certificate of Federal questions was filed herein:

It is hereby certified that this case involved the consideration and decision of the following Federal questions:

1st. Whether the act approved May 1st, 1896, entitled An act to amend the charter of the city of Covington in so far as section 31 of said act exempted the water works, pumping-house, machinery, &c., from State, county, and city taxes is or not constitutional.

2nd. Whether or not the levy and sale of the water-works prop-

erty under the tax writ from the State and subjecting it to the payment of State taxes is in violation of paragraph 1, section 10, article 1, of the Constitution of the United States, which prohibits the enactment of laws impairing the obligation of contracts.

3rd. That the act of Nov. 11th, 1892, relating to revenue and taxation, under which the board of supervisors of Campbell county and the sheriff valued or attempted to value and assess the water works for taxation, was void and of no effect and impaired the obligation of the contract between the Commonwealth of Kentucky and the defendant by which the water-works property was exempt from taxation; that the assessment and levy under legislative authority on defendant's property was in direct violation of section 10 of art. 1 of the Constitution of the United States.

All these questions were decided adversely to the defendant, The Water Works Company, and were necessary to the determination of the cause of the Commonwealth of Kentucky against the defendant.

JNO. H. LEWIS,

Chief Justice Ky. Court of Appeals.

28 Afterwards, on the 21st day of July, 1897, the plaintiff in error and defendant filed in the clerk's office of the court of appeals an assignment of errors in words and figures following, to wit:

1st. The court of appeals of Kentucky erred in holding that the act of the legislature approved May 1st, 1896, amending the charter of the city of Covington exempting the property of the water works from taxation, was unconstitutional.

2nd. The court erred in holding that the levy and sale of the water-works property to satisfy the taxes claimed by the State of Kentucky was valid.

3rd. The court erred in holding that the board of supervisors of Campbell county, in connection with the sheriff, had the power to value and assess the water-works property for taxation by virtue of the act of Nov'r, 1892.

4th. The trustees claim that the assessment, valuation, levy, and sale of the property of the water-works Co. was void and in violation of the contract between the city of Covington and the State by which the water-works property was exempt from all taxes, State, county, and municipal.

TRUSTEES OF COVINGTON
WATER WORKS,

By W. S. PRYOR, *Counsel.*

Afterwards, on the — day of —, 1897, the following writ of error was filed in the clerk's office of the court of appeals and herewith returned (a copy being retained in said clerk's office):

29

UNITED STATES OF AMERICA, }
District of Kentucky, Sixth Judicial Circuit, } ss :

The President of the United States to the honorable the judges of the court of appeals of Kentucky, Greeting :

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of appeals, before you or some of you, being the highest court of law or equity of said State in which a decision could be had in the said suit between The City of Covington, appellant, and Commonwealth of Kentucky, appellee, wherein was drawn in question the validity of the act of 11th November, 1892, by which the board of supervisors of Campbell county and the sheriff undertook to value and assess the property of the water works company for taxation, and also the right of the State, under the statute in relation to revenue and taxation, to levy and assess for taxation the property of the defendant, The Water Works Company, on the ground of their being repugnant to the Constitution of the United States, and the decision was in favor of such their validity, a manifest error hath happened, to the great damage of said appellant, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, within thirty days from the date of this writ, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected,

30 the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 9th day of August, in the year of our Lord one thousand eight hundred and ninety-seven, and of the Independence of the United States of America the one hundred and twenty-first.

WALTER G. CHAPMAN,
*Clerk of the Circuit Court of the United States
 for the District of Kentucky.*

Allowed by—

JOS. H. LEWIS,

Chief Justice Court of Appeals of Kentucky.

31

THE COMMONWEALTH OF KENTUCKY, set :

I, Abram Addams, clerk of the Kentucky court of appeals, in compliance with the writ of error herewith returned (a copy of which is on file in my office), hereby certify that the preceding thirty pages

contain a full and complete transcript of the record and proceedings had in said court of appeals in a case wherein The City of Covington is appellant and The Commonwealth of Kentucky is appellee, together with the original writ of error and copies of the certificate of Federal questions and assignment of errors, as the same appear of record and on file in my office.

In testimony whereof I have hereunto
Seal Kentucky Court set my hand and affixed the seal of my
of Appeals. office. Done at Frankfort, Kentucky, this
9th day — August, A. D. 1897.

ABRAM ADDAMS,
Clerk Kentucky Court of Appeals.

Fee for this transcript, \$11.50.

32 UNITED STATES OF AMERICA, ss:

To Commonwealth of Kentucky, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Kentucky court of appeals, wherein City of Covington is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Joseph H. Lewis, chief justice of the Kentucky court of appeals, this 9th day of August, in the year of our Lord one thousand eight hundred and ninety-seven.

JOS. H. LEWIS,
Chief Justice of the Kentucky Court of Appeals.

33 On this — day of August, in the year of our Lord one thousand eight hundred and ninety-seven, personally appeared Robert L. Greene before me, the subscriber, S. Hannah Innes, a notary public in and for Franklin county, Kentucky, the said Robert L. Greene being personally well known to me, and makes oath that he on this day delivered a true copy of the within citation to William O. Bradley, governor of the Commonwealth of Kentucky, and also to W. S. Taylor, attorney general of Kentucky.

ROBERT L. GREENE.

Sworn to and subscribed the 13th day of August, A. D. 1897.

[Seal of S. Hannah Innes, Notary Public, Franklin Co., Ky.]

S. HANNAH INNES,
N. P., F. Co., Ky.

Endorsed on cover: Case No. 16,651. Kentucky court of appeals. Term No., 152. City of Covington, plaintiff in error, vs. Commonwealth of Kentucky. Filed August 20th, 1897.



Supreme Court of the United States

OCTOBER TERM, 1906

No. 152.

CITY OF COVINGTON, Plaintiff in Error,

Vs.

THE COMMONWEALTH OF KY., Defendant.

BRIEF FOR PLAINTIFF IN ERROR

STANDARD PRINTING CO., NEW YORK, N.Y.

Supreme Court of the United States.

CITY OF COVINGTON, Plaintiff in Error,

Vs.

THE COMMONWEALTH OF KY., Defendant.

BRIEF FOR PLAINTIFF IN ERROR.

There is but a single question involved in this case, and that is: Is the reservoir, pumping-house, machinery, pipes, mains and appurtenances constituting the water-works of the plaintiff in error, subject to State taxation?

By an act of the Kentucky Legislature, passed on May, 1, 1886, the city of Covington was authorized to purchase land and construct upon it water-works. (In the record it is dated 1896, which is an error.) City bonds were authorized to be issued and sold to the amount of \$600,000.00, and, by amended legislation, the city was empowered to issue, in addition, \$400,000.00 of bonds, making in all, one million. The act, and its amendments, are fully set forth in the first paragraph of the answer of the City of Covington on pages 1, 2, 3 of the record.

It was also provided, by the Act of May 1, 1886, that the questions of issuing these bonds, and of the proposed location of the reservoir, should be submitted to the voters of the city, and, if a majority of the votes cast favored the location of the plant, etc., the bonds were to be issued as needed for the purposes of construction.

By section 31 of the Act, it is provided: "Said reservoirs, pumping-house, machinery, pipes, mains and appurtenances, with the land upon which they are situated, shall be and remain forever exempt from State, county and city taxes."

After the construction of this plant, the State imposed a tax of 42½ cents upon each one hundred dollars of assessed property for the year 1894, and the sheriff proceeded to levy and sell the land, etc., upon which this plant stood, for the State taxes for that year, the contention being: There was no consideration for the exemption, and, if there had been, that subsequent legislation had repealed the exemption, and, therefore, the property was subject to State taxation.

Second. It is also maintained by the State that the provisions of the Act of 1886, in force at the time this amendment to the charter was enacted, and now in force, was a reservation by the State of the power to repeal this amendment. That Act provides:

"That all charters and grants, of or to corporations, or amendments thereof enacted or granted, since the 14th of February, 1856, and all other Statutes, shall be subject to repeal at the will of the General Assembly, unless a contrary intent be therein plainly expressed: Provided, That whilst privileges and franchises so granted may be repealed, no repeal shall impair other rights previously vested."

On behalf of the Plaintiff in Error it is contended: That the legislative intent to exempt this property from taxation is so plainly expressed as not to admit of controversy, and, for the express purpose, when accepted, of creating an irrevocable contract between the State and the City of Covington, and that the general law repealing this exemption is in violation of section 10, article 1 of the Constitution of the United States.

Second. It is in violation of section 170 of the State Constitution, providing: "There shall be exempt from taxation public property used for public purposes."

It is a contract by which the City of Covington undertook, in discharge of a public duty, to render a public service, and, to enable it to do so, placed upon its citizens this heavy burden, by way of taxation, to accomplish the object in view. Section 21 of this amended legislation recites that these works are to be constructed "to the end that the City of Covington and the citizens thereof may be furnished with an ample supply of pure water *for all purposes.*"

As said by the Court, in the case of the Town of West Hartford vs. The Board of Water-works, reported in 44 Conn., page 367:

"The introduction of a supply of water for the preservation of the health of its inhabitants, by the city of Hartford, is unquestionably now to be accepted as an undertaking for the public good in the judicial sense of that term; not, indeed, as the discharge of one of the few governmental duties imposed upon it, but as ranking next in order."

In the case of the State of Ohio vs. City of Toledo, and the State vs. Hosler, 48 Ohio State, 112, the question

arose as to whether the furnishing of natural gas, by the city, was for a *public purpose*? The Court saying, that while "the benefits and conveniences offered may not be embraced by all, they are, notwithstanding, designed for the general advantage, and subserve what is recognized as a public purpose." This case might fall within the rule laid down in those cases, and, under the former Constitution, where the exemptions exist, be in consideration of public service. The City of Covington, in a governmental sense, is performing a public service in providing water to its citizens.

It is insisted, however, that the Court of Appeals of Kentucky, as well as this Court, has disposed of this question in the case of the Louisville Water Co. vs. Clark, reported in 143 United States, page 10, in holding that the general reservation of power, in the Act of 1856, was a part of the contract in that case, and when the charter was acquired, the right to withdraw the immunity from taxation depended on the legislative will.

The Louisville Water Co. was originally a private corporation, and the Sinking Fund of the City acquired the stock, by purchase, and there was no such condition in the grant as prevented the Legislature from repealing that provision of the charter exempting it from taxation. That no right was taken from it, save the immunity from taxation, and the power to do this was expressly reserved by the Act of 1856.

In the case being considered, the Plaintiff in Error, upon the faith of this exemption from taxation, submitted the question to the tax-payers of the city, as to whether this \$600,000.00 in bonds should be issued and sold as

required by the act, and, as an inducement to accept the provisions of the act, section 61 of the amended charter expressly exempted the plant from taxation.

The Legislature said to the City of Covington, if by a popular vote of your people you will agree to perform this public service, the property purchased with the proceeds of these bonds shall not be taxed. The amendment was accepted and the citizens agreed to be taxed on the faith that this, as well as every other provision in the charter, would be complied with.

It was certainly not contemplated by the parties to this legislation that the Plaintiff in Error, when undertaking to construct this plant and subject its citizens to a taxation of one million dollars for that purpose, that the Legislature at its pleasure could repeal the amendment and impose the tax, when the exemption from this burden was one of the principal inducements of the citizens to vote for the measure.

That the Legislature had the power to authorize the municipality of the City of Covington to issue these bonds is not doubted. Pure water is indispensable to the health and comfort of the inhabitants of any city, and, when devoted, as this plant is required, to the "furnishing the city and its people with an ample supply of pure water for all purposes," it is rendering a public service, nor will it be conceded, that, under the former Constitution or the the present Constitution, the Legislature transcends its power, in any manner, in exempting such property from taxation, by an agreement, as in this case, when the use and proceeds of such property are alone devoted to public and municipal purposes.

These municipal corporations are the mere agencies of the State and a delegation of power to do that which, in a governmental sense, is necessary for the health and comfort of those living within the municipality, is in derogation of no private right, nor an unjust discrimination on the part of the State, when imposing the burden of taxation.

NEW CONSTITUTION.

The present Constitution not only comes in aid of the construction placed upon this legislation by the Plaintiff in Error, but settles the point in controversy.

Section 170 of the present Constitution, Kentucky Statutes, page 132, in express terms, specifies the property exempted from taxation. It provides: "*There shall be exempt from taxation public property used for public purposes ;*" and, by this same section, the Legislature is given the *power to authorize* cities and towns to exempt manufacturing establishments from municipal taxation for the period of five years.

The contention, by the State is, that this clause of the present Constitution, adopted in the year 1891, being prior to the levy and sale of the property of the Plaintiff in Error, applies only to such public property as is indispensable to the administration of the municipal government, such as station-houses, court-houses, etc., and in support of this contention, reference is had to the case of the City of Louisville vs. Commonwealth, reported in 1st Duvall, page 295, where the Kentucky Court of Appeals, under a statute then in existence, that provided :

"Houses of public worship and land held under the

"laws of this State by any denomination of Christians, or professors of religion, for devotional purposes, to the extent of five acres, and the land upon which any seminary of learning is erected, to the extent of five acres, held fiducially or individually, and custom-house, post-office building, court-room or other necessary offices or hospitals, built or owned by the United States, including the lots of ground on which they are erected, and all libraries, philosophical apparatus, owned by any seminary of learning, and all church furniture and books for the objects and uses of religious worship, shall be exempt from taxation and may not be listed by the assessor."

With such an act then under consideration by the Court of Appeals of Kentucky, more than thirty years past, it might well be said that the Act was such a restriction of judicial power as to confine the Court to the exemption of such property as was absolutely essential to the existence of municipal government, and the Court, through Mr. Justice Robertson, in that case, said:

"But neither the State nor a county has ever been considered a person contemplated by any tax law ever enacted. And does not the only reason for these constructive exclusions equally exempt the municipal property of Louisville, used for the convenience and facility of its local government? We think so; and, without elaborate argument, so adjudge. The exceptions specified in the Statute, as herein quoted, do not imply that municipal property, used for public purposes of local government, was intended by the Legislature to be subject to taxation."

If the constitutional provision of 1891 had been found in this Statute, viz: "*There shall be exempted from taxation public property used for public purposes,*" can there be any doubt but the learned Court would have held that

engines, engine-houses, etc., were not only essential, but used for public purposes? They might be dispensed with for governmental purposes, but, at this late day, with the necessity for water and light to the inhabitants of any city, it would be idle to say that the city, the owner of its water-works, so essential for the health of its inhabitants, so necessary for preventing conflagration and the destruction of the dwellings of the citizens by fire, that the use of such works, with the fire engines necessary to make them effectual, was not public property devoted to public purposes. Can it be said that the water-works, the fire-engines and the gas-light, when owned by the city, is private property for private gain, under section 170 of the State Constitution?

The fact that the water-works belongs to the local public and are used for local public purposes, can make no difference. We might argue, in fact, that such works are now essential to the proper administration of a city government, but, if not, it is within the meaning of the Constitution, public property used for a public purpose.

In the case of the New Orleans Gas Co. vs. The Louisiana Gas Light Co., 115 U. S., 650, this Court said: "But as the distribution of gas in thickly populated districts is a matter of which the public may assume control, services rendered in supplying it for public and private use constitute, in our opinion, such public services as authorizes the Legislature to grant the exclusive privilege."

It is clear that this public property, applied to public use, is exempt from taxation under the present Constitution; and, that neither the case in 1st Duvall nor the case of Clark vs. The Water Co., reported in 143 U. S., settles the question to the contrary.

In the case of the Commonwealth vs. McKibben, County Judge, reported in 90 Ky., 384, the original grant contained no clause of exemption, and the Court of Appeals of Kentucky, following the case in 1st Duvall, held the exemption unconstitutional, conferring the right of exemption to such property as was necessary to carry on the government of the city.

The citizens of Covington are taxed to pay the principal and interest on these bonds—they are then taxed for the water they use, “and the net revenue derived from the Water-works, if any, shall be applied exclusively to the improvement or reconstruction of the streets or other public ways of the city.” (Kentucky Statutes, section 3104.

It is difficult to perceive how this charter of property is to be termed *private* property for private use or public property for *private* use.

The Kentucky Court of Appeals has not construed this provision of the new Constitution referred to, but, that it is public property applied alone to public use, should not admit of controversy. The demurrer to the answer of the Plaintiff in Error should have been overruled.

We ask a Reversal.

William Goehle

W S Payer
Counsel

[FOR CITATIONS, SEE NEXT PAGE.]

CITATIONS.

Section 10, Article 1, Constitution of United States.

Town of West Hartford vs. Board of Water-Works, 44 Conn., page 367.

State of Ohio vs. City of Toledo, {
State of Ohio vs. Hosler, { 48 Ohio State, p. 112.

Louisville Water Co. vs. Clark, 143 U. S., page 10.

City of Louisville vs. Commonwealth of Ky., 1 Duvall, page 295.

New Orleans Gas Co. vs. Louisiana Gas Light Co., 115 U. S., page 650.

Commonwealth of Ky. vs. McKibben, County Judge, 90 Ky., page 384.

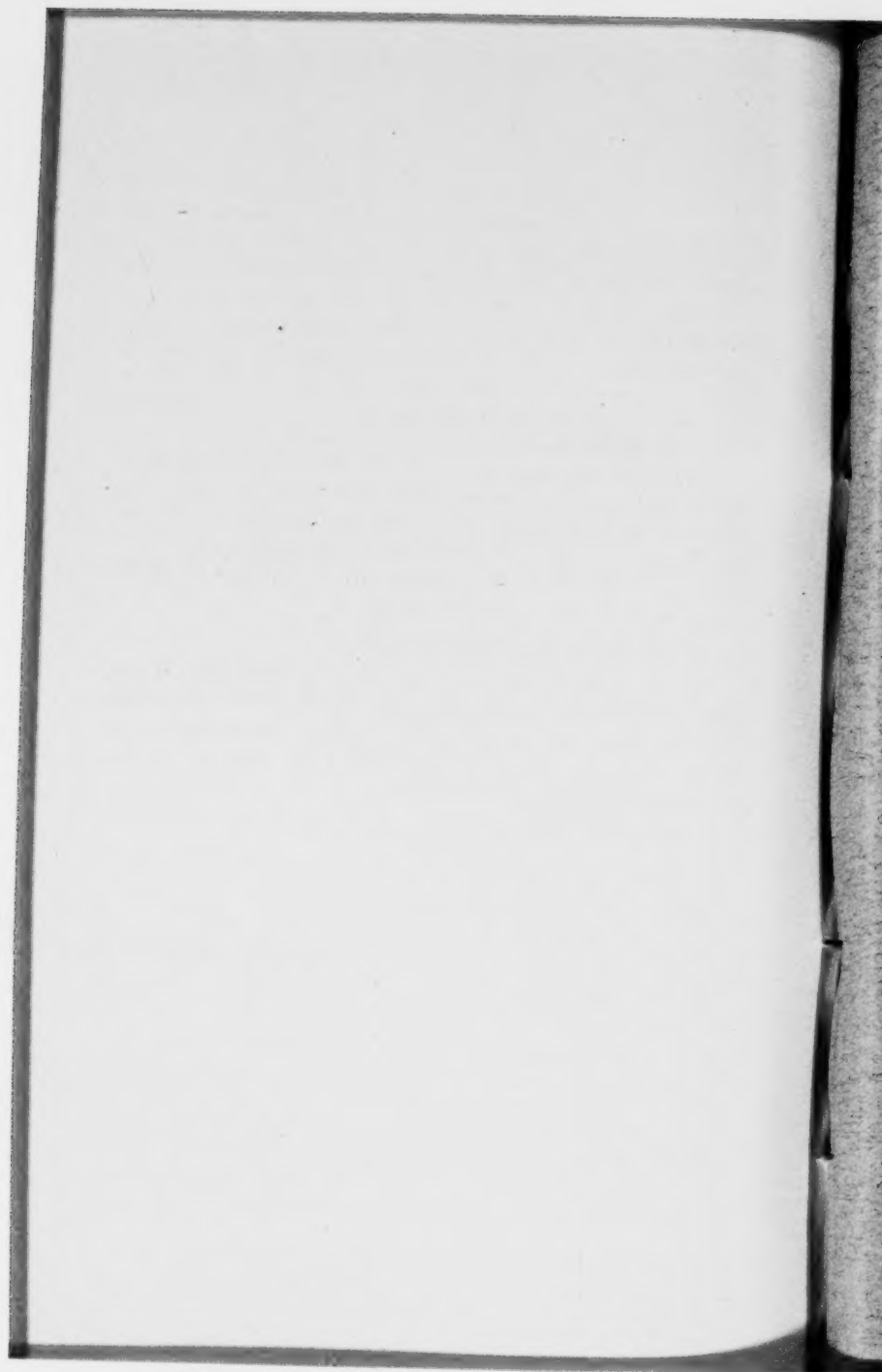
Section 170 of the present Constitution of Kentucky, which is as follows:

“Section 170. Property exempt—Cities may exempt Manufactories. There shall be exempt from taxation public property used for public purposes; places actually used for religious worship, with the grounds attached thereto and used and appurtenant to the house of worship, not exceeding one-half acre in cities or towns, and not exceeding two acres in the country; places of burial not held for private or corporate profit, institutions of purely public charity, and institutions of education not used or employed for gain by any person or corporation, and the income of which is devoted solely to the cause of education: public libraries, their endowments, and the

income of such property as is used exclusively for their maintenance; all parsonages or residences owned by any religious society, and occupied as a home, and for no other purpose, by the minister of any religion, with not exceeding one-half acre of ground in towns and cities and two acres of ground in the country appurtenant thereto; household goods and other personal property of a person with a family, not exceeding two hundred and fifty dollars in value; crops grown in the year in which the assessment is made, and in the hands of the producer; and all laws exempting or commuting property from taxation other than the property above mentioned shall be void. The General Assembly may authorize any incorporated city or town to exempt manufacturing establishments from municipal taxation, for a period not exceeding five years, as an inducement to their location."

Section 3104, Kentucky Statutes:

"Revenue from Water-works Applied to Public Ways. The net revenue derived by any city of the Second Class from its Water-works shall be applied exclusively to the re-improvement or reconstruction of the streets and the other public ways of the city."



No. 152.

Office Supreme Court U. S.
FILED

FEB 3 1899

JAMES H. McKENNEY,
Clerk.

Filed Feb. 3, 1899.

Court of Appeals of Kentucky.

JANUARY TERM, 1899.

CITY OF OWENSBORO, Appellant,

VS.

COMMONWEALTH OF KY., ET. AL., Appellees.

APPEAL FROM DAVIESS CIRCUIT COURT.

OPINION OF THE COURT BY JUDGE PAYNTER.



Court of Appeals of Kentucky.

JANUARY TERM, 1899.

CITY OF OWENSBORO, Appellant,

VS.

COMMONWEALTH OF KY., ET. AL., Appellees.

APPEAL FROM DAVIESS CIRCUIT COURT.

OPINION OF THE COURT BY JUDGE PAYNTER.

This appeal involves the question as to the right of the Commonwealth to compel the city of Owensboro to pay taxes upon property as follows, to-wit:

1. The fire department property including engine-houses and grounds on which situated, fire-engines, hose, reels, hook and ladder wagons, hose and necessary horses.

2. A public park of the city.

At the time the case of the city of Louisville vs. Commonwealth, 1 Duvall, 295 was decided, there was no statute defining what part of the property belonging to municipalities should pay tax, or what part should be exempt from taxation. The language of the statute then in force was so comprehensive as to embrace all property as taxable which belonged to municipalities. The Court held that the law constructively applied to persons only and not at all to public bodies exercising, in different degrees, the sovereignty of the State, and that "the city of Louisville, to the extent of the jurisdiction delegated to it by its charter, is but an effluence from the sovereignty of Kentucky, governs for Kentucky, and its authorized

legislation and local administration of law are legislation and administration by Kentucky through the agency of that municipality."

The Court was of the opinion that the exception, specified in the statute, did not imply that municipal property, "*used for public purposes of local government*," was to be taxed and adjudged the property of the city of Louisville, "*used for carrying on its municipal government*," was exempt from taxation. In determining what property was *constructively* subject to, and what was exempt from taxation under the statute, it said:

"Whatever property, such as court-house, prison and the like, which became necessary or useful to the administration of the municipal government, and is devoted to that use, is exempt from State taxation: but whatever is not so used, but is owned and used by Louisville in its *social or commercial capacity* as a private corporation, *and for its own profit*, such as vacant lots, market-houses, fire-engines and the like, *is subject to taxation*. If, however, as just indicated, the property owned by the city as a private corporation, is not used for profit to the city, but is dedicated to *charity*, it is not constructively subject to taxation under any existing law."

The effect of the opinion is that, under the statute, the Court could not adjudge any property belonging to the municipality exempt from taxation except such as was used for *charity, or used or needed for a governmental purpose*, and the Court concluded that *engine-houses* were not used or needed for that purpose.

The opinion of the Court in *1 Duvall* is criticised by Dillon on Municipal Corporations, section 774, note 1, wherein it is in effect said the exemption by implication should have extended to all the property of the city sought to be taxed.

Cooley on Taxation, 173-4, likewise criticises the opinion by saying it limits the implied exemption unreasonably.

We recognize as just in part the criticism made by the learned authors. The case was decided in February, 1864.

and at a time when the General Assembly was in session. That body evidently was of the opinion that the Court did not give the construction to the statute which the legislative department of the government intended it to have, for on the 22d of February, 1864, an act was approved which provides: "That all property belonging to any city or town of this Commonwealth, and which is necessary to the carrying on the government of such city or town, viz: "Police court-houses, mayor's offices, including offices for the various city or town officers in said buildings, fire-engine houses, engines and horses belonging thereto, work-houses, alms-houses, hospitals, pest-houses, together with the grounds belonging thereto, be, and the same is, hereby exempt from all taxation."

By the express declaration of the act, engines and engine-houses were necessary to carrying on the government of cities. This statute remained in force until the enactment of the "Hewitt Law," in which there was a clause for the exemption of property belonging to counties, cities and towns in the following language, to-wit:

"Property owned in its entirety by counties, cities and towns, which is necessary to carry on the government of such county, city or town. (General Statutes, edition 1828, p. 1036.)" This provision remained in force until the adoption of the present Constitution, section 170 of which reads as follows:

"There shall be exempt from taxation public property used for public purposes."

From this section it must be determined whether or not the municipality must pay taxes upon the property mentioned.

It is hardly necessary to observe that a municipality is an arm of the State, an "effluence" from its sovereignty, and is an instrumentality by which the State seeks to give to its citizens the best government possible. The police force of a city is for the protection of the lives and property of the citizens of the State; but especially within

the limits of the municipality, and the cost of maintaining it is paid at public expense. The firemen of a municipality are paid out of taxes levied for that purpose, and they are maintained to protect the lives and property of citizens of the Commonwealth. The firemen of a city are just as essential to its safety and proper government as is its police force. The fire department can only be effective by having engines, engine-houses and appliances which are usual in meeting the demands on the department. The property of a city, used in connection with its fire department, is, in our opinion, *public property used for public purposes*, and is necessary to its government.

Hickman Park is a public park maintained at public expense, not for profit, but for the public good. It is open to the rich and poor alike, whether they live in or outside the city. The municipal authorities are charged with the duty of maintaining the public health, and, in the judgment of scientific men, it is essential to the public health that cities have and maintain parks where the people can breathe wholesome air. People of this enlightened age justify the levying of taxes to maintain them. They are just as much public property used for public purposes as are the streets and trees planted therein, and it would be just as proper and reasonable to tax the one as the other. The public have access to and enjoy both. In our opinion the public park is public property, used for public purposes, and necessary to the proper government of a city. Besides, why should an "effluence" from the sovereignty pay taxes to it on property which is essential to the proper discharge of the duty imposed of maintaining the public health?

The judgment is reversed for proceedings consistent with this opinion.

Judge Guffy dissenting.

Judge White dissenting.

J. A. DEAN for appellant.

W. S. MORRISON and T. L. KARN for appellees.

DEC 27 1898

JAMES H. McKENNEY,
Clerk.

No. 152
Ex. of Taylor for D. C.
Filed Dec. 27, 1898.
Supreme Court of the United States of America

No. 152

CITY OF COVINGTON,

Plaintiff in Error,

v.

THE COMMONWEALTH OF KENTUCKY,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR

W. S. TAYLOR,

Attorney General of Ky.

RAMSAY WASHINGTON,

County Attorney,

Campbell County, Ky.

Supreme Court of the United States of America.

CITY OF COVINGTON, . . . Plaintiff in Error,

vs. { **Brief for Defendant in Error.**

COMMONWEALTH OF KENTUCKY, . Defendant in Error.

By an act of the General Assembly of the Commonwealth of Kentucky, approved May 1, 1886, entitled "An act to amend the charter of the city of Covington," the city of Covington was authorized and empowered to issue bonds and with the proceeds thereof to build a water-works, reservoir, etc., in Campbell county, Kentucky.

It was provided in section 31 of said act, that "said reservoir or reservoirs, pumping-house, machinery, pipes, mains and appurtenances, with the land upon which they are situated, shall

be and remain forever exempt from State, county and city taxes."

The city of Covington in conformity with the said act purchased property and built a water-works in Campbell county, Kentucky, worth nearly a million dollars, from which it sells water to its own inhabitants as well as those of the neighboring towns.

In 1894 the assessor of Campbell county, assessed the property of the Covington Water-works for State and county taxation for the year 1895; the city of Covington, the owner, refused to pay the tax.

This action was brought to recover possession of said water-works property for the State.

The city of Covington contends that the exemption from taxation in the charter constitutes a contract within the meaning of the Constitution of the United States, which says, "That no State shall pass any law impairing the obligation of contracts."

The defendant in error, the Commonwealth of Kentucky, contends that the property is subject to assessment and taxation, and that the acts of the assessor, Board of Supervisors and sheriff of Campbell county, in assessing and taxing the said water-works property, were valid; and that the clause in the act, approved May 1, 1886, exempting the said water-works property from taxation is unconstitutional, and that this court has no jurisdiction over this case, for the following reasons, to-wit:

First. The Constitution of Kentucky, which became a law on June 11, 1850, and was in full force and effect in 1886, when the Legislature passed and approved the "act to amend the charter of the city of Covington," which exempted the property of the Covington Water-works from taxation, declares,

"That no man or set of men are entitled to exclusive separate public emoluments or privileges from the community, but in consideration of public services." See article 13, section 1.

It is respectfully submitted to your honors that the exemption of this property would be a violation of this section of the Constitution.

The following cases are cited in support of this:

Commonwealth v. Makibben, 90 Ky., 384.

Wm. Clark v. Louisville Water Co., 90 Ky., 517.

Sutton's Heirs v. City of Louisville, 5 Dana, Ky., 28-31.

Lancaster v. Clayton, 86 Kv., 373.

Second. By a general law of the General Assembly of Kentucky, entitled "An Act reserving power to amend or repeal charters and other laws, approved February 14, 1856, the Legislature reserved the right to amend or repeal all laws, in the following language, to-wit:

Section 1. "That all charters, and grants of, or to corporations or amendments thereof, and all other statutes, shall be subject to amendment or repeal, at the will of the Legislature, unless a contrary intent be therein plainly expressed."

It is respectfully submitted that the General Assembly having reserved the right to amend or repeal charters, and other laws, by the general act, approved February 14, 1856, it could, at will, amend or repeal the act "to amend the charter of the city of Covington," which was approved May 1, 1886; and that said act was amended or repealed by sections 171 and 172 of the present Constitution of Kentucky, approved September 28, 1891, which provides:

"Sec. 171. The General Assembly shall provide by law an annual tax, which, with other resources, shall be sufficient to defray the estimated expenses of the Commonwealth for each

fiscal year. Taxes shall be levied and collected for public purposes only. They shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax; and all taxes shall be levied and collected by general laws.

"Sec. 172. All property, not exempted from taxation by this Constitution, shall be assessed for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale; and any officer, or other person authorized to assess values for taxation, who shall commit any willful error in the performance of his duty, shall be deemed guilty of misfeasance, and upon conviction thereof shall forfeit his office, and be otherwise punished as may be provided by law."

And also by section 2 of an act of the General Assembly of Kentucky, approved November 11, 1892, entitled "An act relating to revenue and taxation;" and being section 4020 of the Kentucky Statutes, provides:

"Sec. 2. All real and personal estate within this State, and all personal estate of persons residing in this State, and of all corporations organized under the laws of this State, whether the property be in or out of this State, including intangible property, which shall be considered and estimated in fixing the value of corporate franchises as hereinafter provided, shall be subject to taxation, unless the same be exempt from taxation by the Constitution, and shall be assessed at its fair cash value, estimated at the price it would bring at a fair voluntary sale."

Section 1 of the division entitled "Conclusion" of said act of November 11, 1892, is as follows:

"Sec. 1. All acts and parts of act in conflict with this act are hereby repealed, except an act, entitled 'An act to provide additional funds for the ordinary expenses of the State gov-

ernment,' approved June 4, 1892, and also except an act amendatory thereof, approved July 6, 1892."

In section 170 of the new Constitution, after an enumeration of the property which shall be exempt from taxation, it is provided:

"All laws exempting or commuting property from taxation, other than the property above mentioned, shall be void."

Holyoke Water Co. v. Lyman, 15 Wall., 500.

Miller v. N. Y., 15 Wall., 478.

Union P. R. Co. v. Phila., 101 U. S., 528.

Louisville Water Co. v. Wm. Clark, Sheriff, 143 U. S., 1.

Third. The act of the General Assembly of Kentucky, entitled "An act to amend the charter of the city of Covington," approved May 1, 1886, in which the property of the Covington Water-works was exempted from taxation, was a *public law*, relating to a *public subject*.

It is respectfully submitted, that any privilege granted to a public subject by a public law, may be withdrawn at any time, as the power of the Legislature over a municipality is supreme.

See the following cases, to-wit:

Layton v. New Orleans, 12 La. Ann., 518.

Tinsman v. Bellvidere R. Co., 26 N. J. L., 148.

Jersey City v. New Jersey, 20 N. J. Eq., 360.

Raders v. Southerly Rd. Dist., 36 N. J. L., 273.

Williamson v. State, 46 N. J. L., 204; 44 N. J. L., 165.

Spring Valley W. Wks. v. San Francisco, 61 Cal., 3; 8 Sawy. U. S., 555.

Williamson v. New Jersey, 130 U. S., 189.

New Orleans v. N. O. W. Wks. Co., 142 U. S., 44.

Blessing v. Galveston, 42 Texas, 641.

- Washburn v. Oshkosh, 60 Wis., 453.
 Smith v. People, 140 Ill., 355.
 Stone v. Mississippi, 101 U. S., 814, 1079.
 Newton v. Mahoning Co., 100 U. S., 548.
 East Hartford v. H. Bdge. Co., 10 How., 511.
 Same v. Same, 10 How., 541.
 Berlin v. Gorman, 34 N. H., 266.
 Trustees v. Tatman, 13 Ills., 27.
 People v. Morris, 13 Wend., N. Y., 331.
 St. Louis v. Russell, 9 Mo., 507.
 Louisville v. University, 15 B. Mon., Ky., 642.
 Montpelier v. East M., 29 Ver., 12.
 Brighton v. Wilkinson, 2 Allen, Mass., 27.
 Reynolds v. Baldwin, 1 La. Ann., 162.
 Cooley's Con. Lim., 193.
 Black on Con. Prohibitions, section 44.
 1 Dillon on Municipal Corporations, secs. 24, 30-37.
 2 Story on Const., sec. 1393.
 2 Kent., 305.

Fourth. A charter of incorporation is not a contract; to constitute a contract a consideration must be shown, or in other words, a legal contractual obligation.

There are conflicting decisions upon this proposition, it having been decided that a charter of incorporation was a contract; and, again, that it was not.

It is respectfully submitted that a careful review of the authorities show that those cases in which a charter was held to be a contract, was where the purpose of the corporation was a public benefit, as, for instance, the case of the Home of the Friendless. The settled doctrine is, that a consideration must be shown.

See the following cases:

Christ Church v. Co. of Phila., 24 How., 300.

Tucker v. Ferguson, 22 Wallace, 527.

Welsh v. Cook, 97 U. S., 541.

West Wisconsin R. Co. v. Trempealeau Co., 93 U. S., 595.

East Saginaw Salt Mfg. Co. v. E. Saginaw, 13 Wall., 373.

Lord v. Town of Litchfield, 36 Conn., 116.

Bradley v. McAtee, 7 Bush, 667.

Louisville R. Co. v. Com., 10 Bush, 43.

The Home of the Friendless v. Rouse, 8 Wall., 430.

Washington University v. Rouse, 8 Wall., 439.

St. Anna's Asylum v. New Orleans, 105 U. S., 362.

Respectfully submitted,

W. S. TAYLOR,

Attorney-General of Kentucky.

RAMSEY WASHINGTON,

County Attorney Campbell Co., Ky.

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pressed," which was in force at the time of the passage of the act of May 1, 1886, tie the hands of the Commonwealth of Kentucky, so that it could not, by legislation, withdraw such exemption, and subject the property to taxation.

Before a statute — particularly one relating to taxation — should be held to be irrevocable, or not subject to amendment, an intent not to repeal or amend must be so directly and unmistakably expressed as to leave no room for doubt; and it is not so expressed when the existence of the intent arises only from inference or conjecture.

A municipal corporation is a public instrumentality, established to aid in the administration of the affairs of the State, and neither its charters, nor any legislative act regulating the use of property held by it for governmental or public purposes, is a contract within the meaning of the Constitution of the United States: and if the legislature choose to subject to taxation property held by a municipal corporation of the State for public purposes, the validity of such legislation, so far as the National Constitution is concerned, cannot be questioned.

THE case is stated in the opinion.

Mr. William Goebel and *Mr. W. S. Pryor* for plaintiff in error.

Mr. W. S. Taylor, Attorney General of Kentucky, and *Mr. Ramsey Washington* for defendant in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

The plaintiff in error, a municipal corporation of Kentucky, insists that by the final judgment of the Court of Appeals of that Commonwealth sustaining the validity of certain taxation of its water-works property, it has been deprived of rights secured by that clause of the Constitution of the United States which prohibits any State from passing a law impairing the obligation of contracts. That is the only question which this court has jurisdiction to determine upon this writ of error. Rev. Stat. § 709.

By an act of the general assembly of Kentucky approved May 1, 1886, the city of Covington was authorized to build a water reservoir or reservoirs within or outside its corporate limits, either in the county of Kenton or in any county adjacent thereto, and acquire by purchase or condemnation in fee

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simple the lands necessary for such reservoirs, and connect the same with the water-pipe system then existing in the city; to build a pumping house near or adjacent to the Ohio River, and provide the same with all necessary machinery and appliances, together with such lands as might be needed for the pumping house, and for connecting it with said reservoir or reservoirs. § 21.

The declared object of that legislation was that the city and its citizens might be provided with an ample supply of pure water for all purposes. To that end the city was authorized and empowered, by its board of trustees, to issue and sell bonds to an amount not exceeding \$600,000, payable in not more than forty years after date, with interest at a rate not exceeding five per cent per annum—such bonds not, however, to be issued until the question of issuing them and the question of the location of the reservoir or reservoirs, whether above or below the city, should first be submitted to the qualified voters of the corporation at an election held for that purpose and approved by a majority of the votes cast.

By section 31 of that act it was provided that “said reservoir or reservoirs, machinery, pipes, mains and appurtenances, with the land upon which they are situated, shall be and remain forever exempt from state, county and city tax.” Ky. Acts, 1885-6, c. 897, p. 317.

A subsequent act, approved February 15, 1888, authorized the city, in execution of the provisions of the act of 1886, to issue and sell bonds to the additional amount of \$400,000. Ky. Acts, 1887-8, c. 137, p. 221.

The scheme outlined in these acts received the approval of the majority of the votes cast at an election held in the city, and thereafter bonds to the amount of \$600,000 and \$400,000 were issued in the name of the city and disposed of.

The proceeds of the bonds were duly applied by the city in building water reservoirs, in constructing the requisite approaches, pipes and mains, in acquiring the lands necessary for the reservoirs and for its approaches and connections, in erecting a pumping house and providing it with necessary machinery and appliances, and in buying land for a pumping house

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and the connection thereof by pipes and mains with the reservoirs.

The entire works upon their completion passed under the control of the city which managed the same until March 19, 1894, by the Commissioners of Water Works, under the act of March 31, 1879, c. 121, Ky. Acts, 1879, p. 93; and since March 19, 1894, they have been controlled under the act of that date, c. 100, by a board, subject to such regulations as the city by ordinance might provide. Ky. Acts, 1894, p. 278. By the latter act it was also provided that the net revenue derived from its water works by any city of the second class — to which class the city of Covington belongs — should be applied exclusively to the improvement or reconstruction of its streets and other public ways.

When the above act of May 1, 1886, was passed there was in force a general statute of Kentucky, passed February 14, 1856, which provided, as to all charters and acts of incorporation granted after that date, that "all charters and grants of or to corporations, or amendments thereof, and all other statutes, shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed: *Provided*, That whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested;" and that "when any corporation shall expire or be dissolved, or its corporate rights and privileges shall cease by reason of a repeal of its charter or otherwise, and no different provision is made by law, all its works and property, and all debts payable to it shall be subject to the payment of debts owing by it, and then to distribution among the members according to their respective interests; and such corporation may sue and be sued as before, for the purpose of settlement and distribution as aforesaid." 2 Rev. Stat. Ky. 121.

This statute was not modified by the general revenue statute of May 17, 1886, which took effect September 14, 1886, and became part of Chapter 68 of the General Statutes of 1888. It constitutes § 1987 of the Revision known as the Kentucky Statutes of 1894. Nor has it been changed by any subsequent legislation in Kentucky.

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The present constitution of Kentucky, adopted in 1891, contains the following provisions:

"§ 170. There shall be exempt from taxation public property used for public purposes. . . .

"§ 171. The General Assembly shall provide by law an annual tax, which, with other resources, shall be sufficient to defray the estimated expenses of the Commonwealth for each fiscal year. Taxes shall be levied and collected for public purposes only. They shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax; and all taxes shall be levied and collected by general laws.

"§ 172. All property, not exempted from taxation by this constitution, shall be assessed for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale; and any officer, or other person authorized to assess values for taxation, who shall commit any wilful error in the performance of his duty, shall be deemed guilty of misfeasance, and upon conviction thereof shall forfeit his office, and be otherwise punished as may be provided by law."

By the Kentucky Statutes of 1894 it is provided:

"§ 4020. All real and personal estate within this State, and all personal estate of persons residing in this State, and of all corporations organized under the laws of this State, whether the property be in or out of this State, including intangible property, which shall be considered and estimated in fixing the value of corporate franchises as hereinafter provided, shall be subject to taxation, unless the same be exempt from taxation by the constitution, and shall be assessed at its fair cash value, estimated at the price it would bring at a fair voluntary sale."

"§ 4022. For the purposes of taxation, real estate shall include all lands within this State and improvements thereon; and personal estate shall include every other species and character of property — that which is tangible as well as that which is intangible."

"§ 4026. The following property is exempt from taxation: Public property used for public purposes. . . ."

COVINGTON *v.* KENTUCKY.

ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

No. 152. Submitted January 18, 1899. — Decided February 20, 1899.

This court is bound by the construction put by the highest court of the State of Kentucky upon its statutes, referred to in the opinion of the court, relating to exemptions from taxation of property used for "public purposes," however much it may doubt the soundness of the interpretation.

The provision in the act of the legislature of Kentucky of May 1, 1886, c. 897, that "the said reservoir or reservoirs, machinery, pipes, mains and appurtenances, with the land on which they are situated," which the city of Covington was, by that act, authorized to acquire and construct, "shall be and remain forever exempt from state, county and city tax," did not, in view of the provision in the act of February 14, 1856, that "all charters and grants of or to corporations, or amendments thereof, and all other statutes, shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent shall be therein plainly ex-

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This act repealed all acts and parts of acts in conflict with its provisions except the act of June 4, 1892, providing additional funds for the ordinary expenses of the state government, and the act amendatory thereof approved July 6, 1892.

In the year 1895 certain lands acquired under the above act of May 1, 1886, and constituting a part of the Covington Water Works, were assessed for state and county taxation, pursuant to the statutes enacted after the passage of that act, and conformably as well to the constitution of Kentucky if that instrument did not exempt them from taxation. The taxes so assessed not having been paid, those lands after due notice were sold at public outcry by the sheriff, (who by law was the collector of state and county revenue,) and no other bidder appearing, the Commonwealth of Kentucky purchased them for \$2187.24, the amount of the taxes, penalty, commission and cost of advertising.

The present action was brought by the Commonwealth to recover possession of the property so purchased.

The principal defence is that the provision in the act of May 1, 1886, that the reservoir or reservoirs, pumping house, machinery, pipes, mains and appurtenances, with the land upon which they are situated, "shall be and remain forever exempt from state, county and city taxes," constituted, in respect of the lands in question, a contract between the city of Covington and the Commonwealth of Kentucky, the obligation of which was impaired by the subsequent legislation to which reference has been made.

Referring to section 170 of the present constitution of Kentucky declaring that "there shall be exempt from taxation public property used for public purposes," the Court of Appeals of Kentucky, in this case, said: "It was followed by necessary statutory enactments, which, however, could neither curtail nor enlarge exemption from taxation as prescribed by the constitution; and accordingly, in section 4020, Kentucky Statutes, adopted for the purpose of carrying out the provisions of section 170, is the identical language we have quoted. As it was manifestly intended by both the constitution and stat-

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ute to make subject to taxation all property not thereby in express terms exempted, it results that, unless the water-works property of the city of Covington be, in the language or meaning of section 170, 'public property used for public purposes,' it must be held, like similar property in other cities, subject to taxation, and the special act of May 1, 1886, stands repealed. Assuming, as a reasonable and beneficial rule of construction requires us to do, that the phrase 'for public purposes' was intended to be construed and understood according to previous judicial interpretation and usage, there can be no doubt of the proper meaning and application of it, for in the cases cited and others, where the question of subjecting particular property of cities to taxation arose, the words 'for public purposes' had been held by this court to mean in that connection the same as the words 'for governmental purposes,' and so property used by a city for public or governmental purposes was held to be exempt, while that adapted and used for profit or convenience of the citizens, individually or collectively, was held to be subject to taxation; and, recognizing and applying that distinction, water-works property of a city has been invariably treated by this court as belonging to the latter class, and consequently subject to the state and county taxation. In our opinion, the property in question is under the constitution subject to taxation, and the statute enacted in pursuance of it operated to repeal the special act of May 1, 1886."

However much we may doubt the soundness of any interpretation of the state constitution implying that lands and buildings are not public property used for public purposes when owned and used under legislative authority by a municipal corporation one of the instrumentalities or agencies of the State, for the purpose, and only for the purpose, of supplying that corporation and its people with water, and when the net revenue from such property must be applied in the improvement of public ways, we must assume, in conformity with the judgment of the highest court of Kentucky, that section 170 of the constitution of that Commonwealth cannot be construed as exempting the lands in question from taxation. In other words, we must assume that the phrase "pub-

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lic purposes" in that section means "governmental purposes," and that the property here taxed is not held by the city of Covington for such purposes but only for the "profit or convenience" of its inhabitants and is liable to taxation at the will of the legislature unless at the time of the adoption of the constitution of Kentucky it was exempt from taxation in virtue of some contract the obligation of which is protected by the Constitution of the United States.

The fundamental question in the case then is whether at the time of the adoption of that constitution the city of Covington had, in respect of the lands in question, any contract with the State the obligation of which could not be impaired by any subsequent statute or by the present constitution of Kentucky adopted in 1891. If the exemption found in the act of 1886 was such a contract, then it could not be affected by that constitution any more than by a legislative enactment.

We are of opinion that the exemption from taxation embodied in that act did not tie the hands of the Commonwealth of Kentucky so that it could not, by legislation, withdraw such exemption and subject the property in question to taxation. The act of 1886 was passed subject to the provision in a general statute of Kentucky, above referred to, that all statutes "shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed." If that act in any sense constituted a contract between the city and the Commonwealth, the reservation in an existing general statute of the right to amend or repeal it was itself a part of that contract. *Griffin v. Kentucky Ins. Co.*, 3 Bush, 592. The city accepted the act of 1886 and acquired under it the property taxed subject to that reservation. There was in the act no "plainly expressed" intent never to amend or to repeal it. It is true that the legislature said that the reservoirs, machinery, pipes, mains and appurtenances, with the land upon which they were situated, should be forever exempt from state, county and city taxes. But such a provision falls short of a plain expression by the legislature that at no time would it exercise the reserved power of

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amending or repealing the act under which the property was acquired. The utmost that can be said is that it may be inferred from the terms in which the exemption was declared that the legislature had no purpose at the time the act of 1886 was passed to withdraw the exemption from taxation; not that the power reserved would never be exerted, so far as taxation was concerned, if in the judgment of the legislature the public interests required that to be done. The power expressly reserved to amend or repeal a statute should not be frittered away by any construction of subsequent statutes based upon mere inference. Before a statute—particularly one relating to taxation—should be held to be irrepealable, or not subject to amendment, an intent not to repeal or amend must be so directly and unmistakably expressed as to leave no room for doubt; otherwise, the intent is not plainly expressed. It is not so expressed when the existence of the intent arises only from inference or conjecture.

The views we have expressed as to the power of the legislature under a reservation made by general statute of the right to amend or repeal are supported by many adjudged cases. *Tomlinson v. Jessup*, 15 Wall. 454, 458; *Railroad Co. v. Maine*, 96 U. S. 499, 510; *Railroad Co. v. Georgia*, 98 U. S. 359, 365; *Hoge v. Railroad Co.*, 99 U. S. 348, 353; *Sinking Fund cases*, 99 U. S. 700, 720; *Greenwood v. Freight Co.*, 105 U. S. 13, 21; *Close v. Glenwood Cemetery*, 107 U. S. 466, 476; *Spring Valley Water Works Co. v. Schottler*, 110 U. S. 347, 352; *Louisville Gas Co. v. Citizens Gas Co.*, 115 U. S. 683, 696; *Gibbs v. Consolidated Gas Co.*, 130 U. S. 396, 408; *Sioux City Street Railway v. Sioux City*, 138 U. S. 98, 108; *Louisville Water Co. v. Clark*, 143 U. S. 1, 12. In *Tomlinson v. Jessup*, above cited, referring to the reserved power to amend and repeal, this court said: "The object of the reservation, and of similar reservations in other charters, is to prevent a grant of corporate rights and privileges in a form which will preclude legislative interference with their exercise if the public interest should at any time require such interference. It is a provision intended to preserve to the State control over its contract with the corporators, which, without that provi-

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sion, would be irrevocable and protected from any measures affecting its obligation. There is no subject over which it is of greater moment for the State to preserve its power than that of taxation. . . . Immunity from taxation, constituting in these cases a part of the contract with the government, is, by the reservation of power such as is contained in the law of 1841, subject to be revoked equally with any other provision of the charter whenever the legislature may deem it expedient for the public interests that the revocation shall be made. The reservation affects the entire relation between the State and the corporation, and places under legislative control all rights, privileges and immunities derived by its charter directly from the State." So in *Railroad Co. v. Maine*, above cited: "By the reservation in the law of 1831, which is to be considered as if embodied in that act, [one subsequently passed,] the State retained the power to alter it in all particulars constituting the grant to the new company, formed under it, of corporate rights, privileges and immunities. The existence of the corporation and its franchises and immunities, derived directly from the State, were thus kept under its control."

In our consideration of the question of contract we have assumed, in harmony with the judgment of the Court of Appeals of Kentucky, that the property in question was held by the city only for the profit or convenience of its people collectively, that is, in its proprietary, as distinguished from its governmental, character. There are cases adjudging that the extent of legislative power over the property of municipal corporations, such as incorporated towns and cities, may depend upon the character in which such property is held. Mr. Dillon, in his work on *Municipal Corporations*, says: "In its *governmental or public character*, the corporation is made, by the State, one of its instruments, or the local depository of certain limited and prescribed political powers, to be exercised for the public good on behalf of the State rather than for itself. In this respect it is assimilated, in its nature and functions, to a county corporation, which, as we have seen, is purely part of the governmental machinery of the sovereignty

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which creates it. Over all its civil, political or governmental powers, the authority of the legislature is, in the nature of things, supreme and without limitation, unless the limitation is found in the Constitution of the particular State. But in its *proprietary or private character*, the theory is that the powers are supposed not to be conferred, primarily or chiefly, from considerations connected with the government of the State at large, but for the private advantage of the compact community which is incorporated as a distinct *legal personality or corporate individual*; and as to such powers, and to property acquired thereunder, and contracts made with reference thereto, the corporation is to be regarded *quo ad hoc* as a private corporation, or at least not public in the sense that the power of the legislature over it or the rights represented by it is omnipotent." 1 Dillon's Munic. Corp. 4th ed. pp. 107, 108, § 66, and authorities cited.

If however the property in question be regarded as in some sense held by the city in its governmental or public character, and therefore as public property devoted to public purposes — which is the interpretation of the state constitution for which the city contends — there would still be no ground for holding that the city had in the act of 1886 a contract within the meaning of the Constitution of the United States. A municipal corporation is a public instrumentality established to aid in the administration of the affairs of the State. Neither its charter nor any legislative act regulating the use of property held by it for governmental or public purposes, is a contract within the meaning of the Constitution of the United States. If the legislature choose to subject to taxation public property held by a municipal corporation of the State for public purposes, the validity of such legislation, so far as the national Constitution is concerned, could not be questioned.

In *New Orleans v. New Orleans Water Works Co.*, 142 U. S. 79, 91, after referring to previous adjudications, this court said that the authorities were full and conclusive to the point that a municipal corporation, being a mere agent of the State, "stands in its governmental or public character in no contract relations with its sovereign, at whose pleasure its charter may

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be amended, changed or revoked, without the impairment of any constitutional obligation, while with respect to its private or proprietary rights and interests it may be entitled to the constitutional protection." Chancellor Kent, in his Commentaries, says: "In respect to public or municipal corporations, which exist *only* for public purposes, as counties, cities and towns, the legislature, under proper limitations, has a right to change, modify, enlarge, restrain or destroy them; securing, however, the property for the uses of those for whom it was purchased. A public corporation, instituted for purposes connected with the administration of the government, may be controlled by the legislature, because such a corporation is not a contract within the purview of the Constitution of the United States. In those public corporations there is, in reality, but one party, and the trustees or governors of the corporation are merely trustees for the public." 2 Kent's Com. 12th ed. p. *306. Dillon says: "Public including municipal corporations are called into being at the pleasure of the State and while the State may, and in the case of municipal corporations usually does, it need not, obtain the consent of the people of the locality to be affected. The charter or incorporating act of a municipal corporation is in no sense a contract between the State and the corporation, although, as we shall presently see, vested rights in favor of third persons, if not indeed in favor of the corporation or rather the community which is incorporated, may arise under it. Public corporations within the meaning of this rule are such as are established for public purposes exclusively—that is, for purposes connected with the administration of civil or of local government—and corporations are public only when, in the language of Chief Justice Marshall, 'the whole interests and franchises are the exclusive property and domain of the government itself,' such as *quasi* corporations (so called), counties and towns or cities upon which are conferred the powers of local administration. Subject to constitutional limitations presently to be noticed, the power of the legislature over such corporations is supreme and transcendent; it may, where there is no constitutional inhibition, erect, change,

Counsel for Parties.

divide and even abolish them, at pleasure, as it deems the public good to require." 1 Dillon's Munic. Cor. 4th ed. p. 93, § 54.

In any view of the case there is no escape from the conclusion that the city of Covington has no contract with the State exempting the property in question from taxation which is protected by the contract clause of the National Constitution.

Perceiving no error in the record of which this court may take cognizance, the judgment is affirmed.